Lafayette Redevelopment Agency Staff Report

For:	Redevelopment Agency Board
By:	Niroop K. Srivatsa
Date Written:	September 2, 2008
Meeting Date:	September 8, 2008
Subject:	Third Amendment to The Woodbury Owner Participation Agreement. Project Location: 3758 Mount Diablo Blvd., APNs: 241-010-024, 033, 034, 040.

Purpose

To approve a Third Amendment to the Owner Participation Agreement (OPA) between The Woodbury, LLC and the Redevelopment Agency (RDA) of the City of Lafayette for The Woodbury residential condominium project.

Background

In November 2005 the Agency entered into an Owner Participation Agreement (OPA) with Risa Road Development, LLC (now The Woodbury, LLC) for the 2.08 acre property located near the intersection of Mt. Diablo Boulevard and Risa Road. The OPA allowed for the construction of seventy two (72) residential condominium units in four (4) buildings.

The parties entered into a First Amendment to the OPA in June 2006 to allow the developer to increase the development to eighty (80) for-sale condominium units in the event it acquired the adjacent property (India Palace restaurant). The parties entered into the Second Amendment to the Agreement in November 2007 to allow for a decrease in the total number of units to not less than sixty (60) units and provide for inclusionary housing at an offsite location within the City of Lafayette.

In May 2008, the applicant submitted a letter requesting permission to defer the payment of fees and the completion of off-site improvements. The letter indicated that the downturn in the housing market had impacted the financing of the project and required the project to be phased over time. In July 2008, the City Council approved the applicant's request to pay the City's impact fees prior to the issuance of the certificate of occupancy rather than prior to the issuance of a building permit. The OPA now has to be amended to reflect the revised project phasing and deferral of the payment of housing in lieu fees and construction of the public sidewalk.

Terms of the Third Amendment to the OPA

The differences between the existing OPA and the Third Amendment are listed below. The changes, with the exception of project phasing, are underlined:

Housing in lieu fees:

Existing OPA: The Owner shall pay to the City an in lieu fee of Eight Hundred Thousand Dollars ($800,000) (the "In Lieu Fee"), prior to sale of first unit in the Project or earlier if requested by the RDA but in no case prior to issuance of a building, grading, or demolition permit on the Project.

Third Amendment: The Owner shall pay to the City an in lieu fee of Eight Hundred Thousand Dollars ($800,000) (the "In Lieu Fee"), prior to the issuance of the certificate of occupancy of the first completed building in the Project.

Provision of affordable units:

Existing OPA: The affordable housing units shall be supplied prior to the closing of the sale of the first unit sold in the Project.

Third Amendment: All affordable rental housing units shall be supplied prior to the issuance of the certificate of occupancy of the first completed building in the Project.

Construction of public sidewalk:

Existing OPA: Prior to issuance of the Certificate of Occupancy for the Second Phase of the Project, Owner shall construct a public sidewalk to be located on the north side of Mt. Diablo Boulevard from Risa Road to Dolores Drive in conformance with City specifications.

Third Amendment: Prior to issuance of the Certificate of Occupancy for Phase 2 of the Project as herein after defined in the Schedule of Performance, Owner shall construct a public sidewalk to be located on the north side of Mt. Diablo Boulevard from Risa Road to Dolores Drive in conformance with City specifications.

Project Phasing:

Existing OPA: Substantial completion of the westerly most structure shall be completed within twenty four (24) months from the commencement of construction ("First Phase of the Project"). The remaining construction shall be completed within the later of: (1) twenty-four (24) months from the commencement of construction; or (2) sixty (60) months from attainment of all necessary permits, entitlements or other approvals, which may be required from the City or any other governmental agency with jurisdiction over the Project for the new construction ("Second Phase of the Project").

Third Amendment:

Phase 1 will include Buildings 2, 3, and 4, the parking garages for Buildings 2, 3, 4, and 5, and public art and landscaping of the EBMUD Property

Phase 2 shall include Building 5 and construction of the Public Sidewalk

Phase 3 shall include Building 1

Staff Comments

In April 2008, the applicant - The Woodbury, LLC – met with staff to discuss the phasing of the project and to request deferral of payment of the City's impact fees and off-site improvements. Staff discussed the request with Agencymembers Tatzin and Federighi (the subcommittee that negotiated the Owner Participation Agreement) and received their preliminary approval. By all indications, the construction of The Woodbury is on track. As stated earlier, the applicant has submitted improvement plans and the final map for the City Engineer's review. The final landscape, signage and lighting plans have been approved by the Design Review Commission. The applicant and staff have met with EBMUD to finalize the improvements to the EBMUD ROW. Finally, the applicant now owns and controls the entire site.

Staff recommends approval of the Third Amendment to the OPA.

Recommendation

Approve the Third Amendment to the Owner Participation Agreement (OPA) between The Woodbury, LLC and the Redevelopment Agency of the City of Lafayette.

Attachment

1. Third Amendment to the Owner Participation Agreement

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:

The Redevelopment Agency of the
City of Lafayette
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549
Attn: Executive Director

[Fee Exempt - Gov't Code § 27383]
(Space above for Recorder's Use)

THIRD AMENDMENT TO THE

RISA ROAD DEVELOPMENT

OWNER PARTICIPATION AGREEMENT

between

THE REDEVELOPMENT AGENCY OF THE CITY OF LAFAYETTE
a California public agency

and

THE WOODBURY, LLC
a California limited liability company

[Dated as of _____, 2008 for reference purposes only]

This Amendment to the Risa Road Development Owner Participation Agreement ("Amendment") is dated as of _____, 2008, for references purposes only and is hereby entered into by and between the Redevelopment Agency of the City of Lafayette, a California public agency ("Agency"), and The Woodbury, LLC, a California limited liability company ("Owner").

RECITALS

This Amendment is entered into with reference to the following facts:

A. The Redevelopment Agency of the City of Lafayette ("Agency") and The Woodbury, LLC, entered into that certain Risa Road Development Owner Participation Agreement dated November 28, 2005 for reference purposes ("Agreement").

B. The parties entered into the First Amendment to the Agreement dated June 12, 2006 to allow Owner to increase the development to eighty (80) for-sale condominium units ("First Amendment")

C. The parties entered into the Second Amendment to the Agreement dated November 13, 2007 to allow for a decrease in the total number of units to not less than sixty (60) units, provide for inclusionary housing at an offsite location within the City of Lafayette, and revise the Regulatory Agreement, the Upset Date, Scope of Development and Schedule of Performance.

D. The parties desire to further amend the Agreement to revise the Schedule of Performance and other timeframes.

TERMS

1. Effective Date of Amendment. This Amendment is dated _____, 2008, for reference purposes only. This Amendment will not become effective until the date ("Effective Date") on which all of the following are true:

(i) This Amendment has been approved and executed by the appropriate authorities of the Owner and has been delivered to the Agency;

(ii) Following all legally required notices and hearings, this Amendment has been approved by the Agency's governing board;

(iii) This Amendment has been executed by the appropriate authorities of the Agency and Owner;

(iv) The Agency has confirmed that the Amendment is recorded and is senior to all nonstatutory liens and encumbrances;

(v) The Owner has acquired fee simple title to the Site; and

(vi) All of the conditions precedent to the Effective Date of the Agreement have been satisfied or waived in writing by the Parties.

If all conditions precedent to the Effective Date have not been satisfied or waived in writing by the Parties by _____, 2008, then unless the date is extended in writing by the parties this Agreement shall not thereafter become effective and any prior signatures and approvals of the Parties will be deemed void ab initio and of no force or effect.

2. Recordation. This Agreement may be recorded by the Agency against the Site at any time following the Effective Date of this Agreement, whereupon Agency shall immediately notify Owner and provide the recording information for such recordation.

3. Amendment of Section 2.4.1 of the Agreement. Section 2.4.1 of the Agreement is hereby amended in its entirety to read as follows:

> "2.4.1 Failure to Obtain Project Approvals. Anything in this Agreement to the contrary notwithstanding, the obligations of Owner to proceed with the Project are subject to termination unless, on or before the Upset Date, the Project Approvals shall have been granted and received and shall provide for the Scope of Development set forth on Exhibit B, and including upon terms and conditions acceptable to Owner, the following:
>
> (i) A minimum Project consisting of not less than 60 for sale Units in five newly constructed buildings.
>
> (ii) Satisfaction of the Agency's inclusionary housing requirement by providing 18 rental units within the City of Lafayette to Qualified Households for the duration of the Qualified Residence Period, as set forth in the Regulatory Agreement in the form substantially attached as Exhibit F to be recorded against the property or properties at which the rental units will be located ("Rental Project") prior to the issuance of the certificate of occupancy of the first completed building in the Project. The rental units will be in an apartment project or projects located within the Lafayette Redevelopment Project Area. The rental units available to Qualified Households within the project or projects will total no more than forty-two percent (42%) of the total available rental units within any such project. Of the rental units for Qualified Households five (5) units shall be provided to a Very-Low Income Household, five (5) units to Low Income Households and eight (8) units to Moderate Income Households. In addition, the Owner shall pay to the City an in lieu fee of Eight Hundred Thousand Dollars ($800,000) (the "In Lieu Fee"), which sum shall be paid without regard to the number of Units within the

Project. The in lieu fee shall be paid prior to the issuance of the certificate of occupancy of the first completed building in the Project. All affordable rental housing units shall be supplied prior to the issuance of the certificate of occupancy of the first completed building in the Project. Owner shall not receive a certificate of occupancy on any unit within the Project until the Regulatory Agreement, in the form attached hereto as Exhibit F, has been recorded against the Rental Project Property.

(iii) Approval of a general plan amendment increasing the height limit from 35 feet not to exceed 41 feet and rezoning to P-1 Planned Unit Development District."

4. Amendment of Section 2.6.1 of the Agreement. Section 2.6.1 of the Agreement is hereby amended in its entirety to read as follows:

"2.6.1 Public Sidewalk. Prior to issuance of the Certificate of Occupancy for Phase 2 of the Project as herein after defined in the Schedule of Performance, Owner shall construct a public sidewalk to be located on the north side of Mt. Diablo Boulevard from Risa Road to Dolores Drive in conformance with City specifications (the "Public Sidewalk"). At Agency's option, prior to the issuance of the Certificate of Occupancy for Phase 2 of the Project, Owner shall in lieu thereof, contribute an amount not to exceed the cost for Owner to construct the Public Sidewalk, as mutually agreed upon by the Parties, to Agency to construct a public walkway along Mt. Diablo Boulevard from Risa Road to the Lafayette Reservoir ("Public Walkway") or Owner shall construct the Public Walkway in conformance with City specification."

5. Amendment to Section 2.8 of the Agreement. Section 2.8 of the Agreement is hereby amended in its entirety to read as follows:

"2.8 Regulatory Agreement. Prior to the issuance of the certificate of occupancy of the first completed building in the Project, Developer shall cause the Regulatory Agreement to be recorded against the Rental Project Property, in the form attached hereto as Exhibit F. In the event the Agency contributes to the Rental Project as enumerated in Section 2.7, the Regulatory Agreement shall be revised to reflect and preserve the new maximum Affordable Rent.

6. Amendment to Exhibit C of the Agreement. Exhibit C of the Agreement is hereby repealed and replaced in its entirety with the attached Exhibit C.

7. Amendment to Exhibit F of the Agreement. Section 1.4 of Exhibit F of

the Agreement is hereby amended as follows:

> "1.4 As a condition to the willingness of the Agency to execute the Owner Participation Agreement, Owner has agreed, for a period of fifty-five (55) years from the date that the restricted units become available and prior to the issuance of the certificate of occupancy of the first completed building on the Woodbury Property, that at least eighteen (18) of the available units within the Residential Project shall be rented or leased, or held available for rent or occupancy to persons or households of very low, low, and moderate income, as further defined in this Regulatory Agreement, all for the public purpose of assisting such individuals and families to afford the cost of decent, safe, and sanitary housing pursuant to the terms of this Regulatory Agreement."

8. Counterparts. This Amendment may be executed in duplicate originals, each of which is deemed to be an original, but when taken together shall constitute but one and the same instrument.

9. No Other Amendments. Except as set forth in this Third Amendment, Second Amendment, and First Amendment, the Agreement remains in full force and effect according to its terms.

10. Incorporation of Amendment. From and after the Effective Date of this Third Amendment, wherever the term "Agreement" appears in the Agreement, it shall be read and understood to mean the Agreement as amended by this Third Amendment.

11. Entire Agreement. This Third Amendment, together with the Second Amendment, First Amendment, and Agreement, constitutes the entire understanding and agreement of the Agency and the Owner with respect to the subject matter set forth herein and therein, integrates all of the terms and conditions mentioned herein and therein, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof or thereof.

12. Defined Terms. All initially capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Agreement.

13. Severability. If any provisions of this Amendment shall be deemed to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired hereby.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment on the date and year first-above written.

[Signatures on following pages]

SIGNATURE PAGE TO THIRD AMENDMENT

AGENCY:

THE REDEVELOPMENT AGENCY OF THE CITY OF LAFAYETTE,
a California public agency

By: _____
Steven Falk
Executive Director

ATTEST:

_____
Joanne Robbins
Agency Secretary

APPROVED AS TO LEGAL FORM:

BEST BEST & KRIEGER LLP

_____
Malathy Subramanian
Agency Counsel

SIGNATURE PAGE TO THIRD AMENDMENT

OWNER:

THE WOODBURY, LLC,
a California limited liability company

By BRANAGH DEVELOPMENT, INC.,
Its Manager

By: _____
Peter Branagh

APPROVED AS TO LEGAL FORM:

MILLER STARR & REGALIA

_____
Eugene H. Miller

EXHIBIT C

SCHEDULE OF PERFORMANCE

The Project shall be completed within 3 Phases (individually, "Phase"). Phase 1 shall include Buildings 2, 3, and 4, the parking garages for Buildings 2, 3, 4, and 5, and public art and landscaping of the EBMUD Property ("Phase 1"). Phase 2 shall include Building 5 and construction of the Public Sidewalk ("Phase 2"). Phase 3 shall include Building 1 ("Phase 3"). A site plan for the Project, which shows in greater detail the location of all of the Buildings is attached hereto as Exhibit C-1.

Owner shall have no more than six (6) months from attainment of all necessary permits, entitlements, or other approvals, which may be required from the City, or any other governmental agency with jurisdiction over the Project to commence construction of each Phase.

Each Phase shall be completed within eighteen (18) months from attainment of all necessary permits, entitlement or other approvals, which may be required from the City or any other governmental agency with jurisdiction over the Project.